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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE
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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 DAVID D. DELAY,
15 Defendant.
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Case No. CR15-175RSL

ORDER ON MOTIONS *IN*
LIMINE

17 This matter comes before the Court on various evidentiary motions by both parties. The
18 government's relevant motions are: "Motion to Exclude Evidence of Victims' Other Sexual
19 Behavior and Sexual Predisposition," Dkt. # 398; "Motion *In Limine* to Preclude Introduction of
20 Irrelevant Information," Dkt. # 421; and "Motion to Exclude Unsubstantiated and Irrelevant
21 Allegations of Sexual Misconduct," Dkt. # 431.

22 Defendant's relevant motions are: "Defendant's FER 412 Motion," Dkt. # 442; "Motion
23 In Limine to Exclude Testimony from S.R.," Dkt. # 454; and "Motion In Limine to Exclude
24 Testimony about Certain Sexual Conduct," Dkt. # 455.

25 Having reviewed the filings submitted by the parties, the Court finds as follows.

26 **I. BACKGROUND**

27 Defendant David Delay is in trial on charges of sex trafficking and child pornography.
28 Some of the government's witnesses, including some alleged victims, have criminal histories

1 and other past difficulties that the government anticipates the defense might introduce as
2 evidence or raise as impeachment material on cross-examination. To that end, the government
3 filed several motions seeking to preclude that evidence. The defense also anticipates the
4 government will introduce evidence involving Delay's sex life or other behavior, which the
5 defense seeks to exclude.

6 The parties agree on the admissibility of several pieces of evidence, but some
7 disagreements remain. First, the parties disagree over whether the defense may cross-examine
8 two alleged victims, S.W. and J.S., about various convictions and past difficulties as evidence of
9 those witnesses' truthfulness, bias, or capacity to recall relevant events. Second, the parties
10 disagree over whether the defense may inquire into certain aspects of the sexual behavior of
11 M.K., a named victim. Third, the parties disagree over the admissibility of testimony from S.R.,
12 who is a witness but not a named victim. Fourth, the parties disagree whether the government
13 may introduce evidence of Delay's sexual encounters with H.N., a named victim. Finally,
14 though not squarely addressed in Delay's filings, the government's motions also cover the
15 admissibility of the alleged victims' past involvement with prostitution.

16 II. DISCUSSION

17 A. Witness Credibility Evidence

18 The defense seeks to cross-examine S.W. and J.S., two witnesses who are also named
19 victims, regarding convictions and other difficulties in their pasts. In particular, the defense
20 seeks to cross-examine S.W., who is now an adult, about multiple convictions and probation
21 violations that occurred when she was a juvenile. For J.S., the defense seeks to cross-examine
22 her about previous arrests in which she admittedly lied to police officers, and about a
23 dependency petition by state authorities to determine whether J.S.'s daughter should be removed
24 from her custody.

25 Under Federal Evidence Rule 608, extrinsic evidence of specific conduct is inadmissible
26 to prove a witness's character for truthfulness or untruthfulness, but the court may allow inquiry
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1 into those specific instances on cross-examination if the instances are probative of the witness's
2 truthful or untruthful character. Fed. R. Evid. 608(b).

3 For past criminal convictions, Rule 609 provides that evidence of a conviction is
4 admissible to prove a witness's character for truthfulness or untruthfulness if the conviction is
5 either for a felony or for a crime that involves "a dishonest act or false statement." Fed. R. Evid.
6 609(a)(1), (2). The latter category "means crimes such as perjury or subornation of perjury, false
7 statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of
8 *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or
9 falsification bearing on the accused's propensity to testify truthfully." United States v. Brackeen,
10 969 F.2d 827, 830 (9th Cir. 1992) (quoting Fed. R. Evid. 609 advisory committee's note).
11 Additionally, if the conviction stemmed from a juvenile adjudication, it is only admissible if,
12 among other things, "admitting the evidence [of the conviction] is necessary to fairly determine
13 guilt or innocence." Fed. R. Evid 609(d)(4).

14 **1. S.W.**

15 The defense seeks to cross-examine S.W. on her probation violations, and on juvenile
16 convictions for forging a driver's license, drug possession, and grand theft. S.W. was arrested
17 several times for violating a term or condition of probation. The defense asserts that those
18 violations go to S.W.'s credibility, because she presumably made in-court promises to abide by
19 the probation conditions she later violated and "[s]omeone who continuously breaks trust with
20 the court in regard to probation is unlikely to have much regard for the oath to tell the truth."
21 Dkt. # 439 at 8. Offenders on probation may violate its terms for any number of reasons,
22 including substance abuse, personal weakness, or plain bad judgment, but breaking a promise is
23 different from telling a lie. The Court finds S.W.'s probation violations are not probative of her
24 character for truthfulness. The defense will therefore be precluded from inquiring into those
25 violations.

26 The other items from S.W.'s past are juvenile convictions for (1) forging or
27 counterfeiting a driver's license or identification card, (2) possessing a controlled substance, and
28 (3) grand theft from a person. All three are juvenile convictions, so evidence of the convictions

1 must be “necessary to fairly determine guilt or innocence,” Fed. R. Evid. 609(d)(4), in addition
2 to being otherwise admissible under Rule 609. Regardless of whether the convictions would be
3 otherwise admissible as felonies or crimes involving falsehood, all three convictions are at most
4 ancillary to this case’s operative issues and are accordingly not “necessary to fairly
5 determin[ing] guilt or innocence.” See id. The defense will therefore be precluded from
6 inquiring about S.W.’s juvenile convictions.

7 **2. J.S.**

8 As noted, the defense also seeks to inquire about arrests in which J.S. admittedly lied to
9 police officers, and about a state dependency petition to determine whether J.S.’s daughter
10 should be placed in state custody. Regarding J.S.’s arrests, she was arrested under circumstances
11 that differ markedly from giving sworn testimony in court, and the Court finds her actions
12 during those arrests have little or no probative value for whether she will be truthful or
13 untruthful in these proceedings. The defense will therefore be precluded from inquiring about
14 J.S.’s arrests.

15 Regarding J.S.’s dependency petition, the defense asserts that substance abuse and mental
16 health issues underlying the petition are relevant to J.S.’s capacity to recall events relevant to
17 this case. The defense also asserts she may be cooperating in this case in exchange for assistance
18 in her dependency proceeding. The government represents that those proceedings have
19 concluded and that there has not been any assistance, nor have there been promises of future
20 assistance, from federal authorities in that state matter. At this time, the Court finds that J.S.’s
21 dependency petition bears little or no probative value to the credibility of her testimony. The
22 defense will therefore be precluded from inquiring about J.S.’s dependency petition, subject to
23 any indications at trial that she cannot recall events at issue in this case.

24 **B. M.K.’s Past Sexual Behavior**

25 The defense also seeks to introduce evidence that involves other sexual relationships of
26 M.K., one of the indictment’s named victims. First, the defense seeks to introduce evidence that
27 M.K. had a sexual relationship with S.H., an otherwise unrelated third party, in which M.K.
28 allegedly “attempted to have forced sexual contact with S.H.” Dkt. # 442 at 4. Second, the

1 defense seeks to introduce evidence of M.K.'s relationship with H.A., another named victim,
2 which may include evidence of the two "sexting" and exchanging explicit photographs.

3 As a threshold requirement for any evidence to be admitted at trial, that evidence must be
4 relevant, Fed. R. Evid. 402, meaning it must tend to make a fact of consequence more or less
5 probable than the fact would be without the evidence, Fed. R. Evid. 401. Even when evidence is
6 relevant, the Court may exclude it if its probative value is substantially outweighed by the risk
7 of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
8 needlessly presenting cumulative evidence." Fed. R. Evid. 403. Additionally, in sex-offense
9 cases like this case, the defense may not present evidence to prove that a victim engaged in other
10 sexual behavior or to prove the victim had a sexual predisposition, except when that evidence is
11 offered to prove consent or when excluding the evidence would violate the defendant's
12 constitutional rights. Fed. R. Evid. 412.

13 Regarding the allegations about M.K. and S.H., the defense asserts that it is relevant to
14 show bias on the part of government investigators and M.K. Dkt. # 449 at 5. Defendant
15 apparently reasons that it shows M.K.'s bias because avoiding prosecution for the alleged
16 misdeeds with S.H. motivated M.K. to cooperate with investigators, even though she cooperated
17 with investigators before the allegations surfaced. Id. The Court finds little reason why this
18 unsubstantiated allegation is relevant to a fact of consequence regarding M.K., and even were it
19 relevant, it bears a significant risk of miring this criminal case in a side trial likely to mislead the
20 jury and confuse the issues. See Fed. R. Evid. 403. It may, however, be relevant for the limited
21 purpose of scrutinizing local authorities' investigation. For that reason, evidence of M.K.'s
22 alleged relationship with S.H. will be excluded, except for the limited purpose of cross-
23 examining relevant investigators about the nature of their investigation.

24 Regarding other evidence of M.K.'s relationship with H.A., online or otherwise, any
25 unrelated explicit photographs she produced are irrelevant, risk confusion and prejudice, or are
26 likely to be offered merely as evidence of M.K. or H.A.'s sexual predisposition. On the other
27 hand, her activities during the period of Delay's alleged crimes may be relevant to show her
28 state of mind during that time and may also be intrinsic to the crimes charged. Evidence of

1 M.K.'s relationship with H.A. will be excluded, except insofar as it is intrinsic to the crimes
2 charged or relevant to her state of mind during the relevant period of time.

3 **C. Testimony of S.R.**

4 The defense also moves to exclude testimony by S.R., who is not an alleged victim but
5 interacted with Delay online. Because S.R. is not actually an alleged victim, the Court concludes
6 that her testimony risks wasting time and presenting needlessly cumulative evidence out of
7 proportion to its potential probative value. See Fed. R. Evid. 403. Her testimony will
8 accordingly be excluded.

9 **D. Delay's Sexual Encounters with H.N.**

10 Finally, the defense moves to exclude evidence of sexual encounters that Delay had with
11 H.N., one of the indictment's named victims. In particular, the defense anticipates she may
12 describe a sexual encounter with Delay that was forced and another that was consensual but
13 violent. The defense argues the evidence's risk of undue prejudice substantially outweighs its
14 probative value, see Fed. R. Evid. 403, and also seeks to exclude it as impermissible evidence of
15 uncharged bad acts, see Fed. R. Evid. 404(b).

16 Rule 404(b) prohibits evidence of uncharged bad acts to prove a person's character and to
17 show that on a particular occasion the person acted in accordance with that character, but the
18 rule allows evidence of other acts for proper purposes, such as showing the person's "motive,
19 opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of
20 accident." Fed. R. Evid. 404(b). Furthermore, evidence of uncharged acts is admissible if it is
21 intrinsic to a charged offense. United States v. Anderson, 741 F.3d 938, 949 (9th Cir. 2013).

22 Delay is charged with attempting to recruit H.N. into his commercial sex scheme through
23 force, fraud, and coercion. His sexual encounters are evidence of his intent, preparation, and
24 plan to execute that scheme. Insofar as he used his sexual encounters as part of his alleged
25 manipulation of H.N., those encounters are also intrinsic to his charged offense. Any risk of
26 undue prejudice, confusion, or delay does not substantially outweigh those encounters'
27 probative value.
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1 **E. Victims' History of Prostitution**

2 Finally, though not squarely addressed in Delay's filings, the government's motions also
3 seek to exclude evidence that Delay's alleged victims engaged in prostitution prior to the events
4 underlying his alleged crimes. Rule 412 bars evidence of a victim's past sexual behavior or
5 evidence of a sexual predisposition, but this case's specific circumstances differ from those of a
6 typical case involving prostitution. Delay's theory is that he was making a documentary about
7 prostitutes, and that he did not actually coerce women with no history of prostitution. Whether
8 his alleged victims were in fact prostitutes is therefore relevant to proving that theory. Given this
9 particular theory, the Court will allow the defense limited leeway to introduce evidence of the
10 fact that this was not a victim's first encounter with prostitution.

11 **III. CONCLUSION**

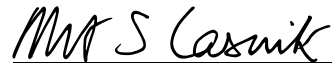
12 For the foregoing reasons, the Court disposes of the parties' pending motions as follows,
13 subject to additional determinations the Court may make at trial.

14 The government's "Motion to Exclude Evidence of Victims' Other Sexual Behavior and
15 Sexual Predisposition," Dkt. # 398; "Motion *In Limine* to Preclude Introduction of Irrelevant
16 Information," Dkt. # 421; and "Motion to Exclude Unsubstantiated and Irrelevant Allegations of
17 Sexual Misconduct," Dkt. # 431, are GRANTED in part and DENIED in part, consistent with
18 this order.

19 Defendant's "Motion In Limine to Exclude Testimony from S.R.," Dkt. # 454, is
20 GRANTED. "Defendant's FER 412 Motion," Dkt. # 442, is GRANTED in part and DENIED in
21 part, consistent with this order. Defendant's "Motion In Limine to Exclude Testimony about
22 Certain Sexual Conduct," Dkt. # 455, is DENIED.

23 To the extent there is additional disputed evidence not covered by this order, the Court
24 reserves ruling on the admissibility of that evidence.
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1 DATED this 26th day of October, 2017.
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5 Robert S. Lasnik
6 United States District Judge
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